



DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2010-E-0663]

Determination of Regulatory Review Period for Purposes of Patent Extension; ALAIR

BRONCHIAL THERMOPLASTY SYSTEM

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) has determined the regulatory review period for ALAIR BRONCHIAL THERMOPLASTY SYSTEM and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of an application to the Director of Patents and Trademarks, Department of Commerce, for the extension of a patent which claims that medical device.

ADDRESSES: Submit electronic comments to <http://www.regulations.gov>. Submit written petitions along with three copies and written comments to the Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT:

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Food and Drug Administration,
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301-796-3602.

SUPPLEMENTARY INFORMATION: The Drug Price Competition and Patent Term Restoration Act of 1984 (Public Law 98-417) and the Generic Animal Drug and Patent Term Restoration Act (Public Law 100-670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: A testing phase and an approval phase. For medical devices, the testing phase begins with a clinical investigation of the device and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the device and continues until permission to market the device is granted. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Director of Patents and Trademarks may award (half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a medical device will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(3)(B).

FDA recently approved for marketing the medical device ALAIR BRONCHIAL THERMOPLASTY SYSTEM. ALAIR BRONCHIAL THERMOPLASTY SYSTEM is indicated for the treatment of severe persistent asthma in patients 18 years and older whose asthma is not well controlled with inhaled corticosteroids and long-acting beta agonists.

Subsequent to this approval, the Patent and Trademark Office received a patent term restoration application for ALAIR BRONCHIAL THERMOPLASTY SYSTEM (U.S. Patent No. 6,411,852) from Asthmatx, Inc., and the Patent and Trademark Office requested FDA's assistance in determining this patent's eligibility for patent term restoration. In a letter dated February 17, 2011, FDA advised the Patent and Trademark Office that this medical device had undergone a regulatory review period and that the approval of ALAIR BRONCHIAL THERMOPLASTY SYSTEM represented the first permitted commercial marketing or use of the product. Thereafter, the Patent and Trademark Office requested that FDA determine the product's regulatory review period.

FDA has determined that the applicable regulatory review period for ALAIR BRONCHIAL THERMOPLASTY SYSTEM is 1,743 days. Of this time, 1,259 days occurred during the testing phase of the regulatory review period, while 484 days occurred during the approval phase. These periods of time were derived from the following dates:

1. The date an exemption under section 520(g) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 360j(g)) involving this device became effective: July 21, 2005.

FDA has verified the applicant's claim that the date the investigational device exemption (IDE) required under section 520(g) of the FD&C Act for human tests to begin became effective July 21, 2005.

2. The date an application was initially submitted with respect to the device under section 515 of the FD&C Act (21 U.S.C. 360e): December 30, 2008. FDA has verified the applicant's claim that the premarket approval application (PMA) for ALAIR BRONCHIAL THERMOPLASTY SYSTEM (PMA P080032) was initially submitted December 30, 2008.

3. The date the application was approved: April 27, 2010. FDA has verified the applicant's claim that PMA P080032 was approved on April 27, 2010.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the U.S. Patent and Trademark Office applies several statutory limitations in its calculations of the actual period for patent extension. In its application for patent extension, this applicant seeks 1,114 days of patent term extension.

Anyone with knowledge that any of the dates as published are incorrect may submit to the Division of Dockets Management (see ADDRESSES) either electronic or written comments and ask for a redetermination by INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by October 24, 2012. To meet its burden, the petition must contain sufficient facts to merit an FDA investigation. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41-42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Interested persons may submit to the Division of Dockets Management (see ADDRESSES) electronic or written comments and written petitions. It is only necessary to send one set of comments. However, if you submit a written petition, you must submit three copies of the petition. Identify comments with the docket number found in brackets in the heading of this document.

Comments and petitions that have not been made publicly available on <http://www.regulations.gov> may be viewed in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: April 16, 2012.

Jane A. Axelrad,
Associate Director for Policy,
Center for Drug Evaluation and Research.

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